

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/04/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

E. Morgenstern
Deputy

LC 2000-002026

FILED: _____

STATE OF ARIZONA
APPELLEE

ROBERT KENT MCCARTHY

v.

EDUARDO MERCADO-BUENO
APPELLANT

JOSE S PADILLA

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC
FINANCIAL SERVICES-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A). This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix City Court and the memoranda submitted by counsel.

Appellant was charged with driving on a suspended or revoked Arizona Driver's license in violation of A.R.S. Section 28-3473.

In an interesting argument Appellant claims that Section 28-3158(C) is unconstitutional as violating the equal protection clause of the 14th Amendment to the United States Constitution. Appellant claims that the law unfairly discriminates against persons within the United States illegally because it is a pre-

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requisite under the statute that the applicant's "presence in the United States is authorized under Federal law."¹

Unfortunately Appellant failed to raise this constitutional issue before the trial court. Rule 16.1 (b) requires motions to be filed "no later than 20 days prior to trial."² Appellant's counsel made an oral motion at the time of trial and requested the trial judge to take the case under advisement and requested permission to supplement his oral motion with a written memorandum. The trial judge did take the case under advisement and held the case pending receipt of Appellant's memorandum until September 14, 2000. At the time of sentencing, Appellant's counsel again raised the constitutionality issue orally and the trial judge responded:

At your request, I took the criminal charge under advisement, and that was to be written motion to be heard on September 14. Nothing was filed, and so he was found guilty on September 14th matter also. I really don't see any good basis at this point for bringing in a document that says he needs his residency before he can get his license reinstated, what effect that would have at this point.³

The Court then proceeded to sentencing.

Generally the failure to raise a claim before the trial court waives the right to appellate review of that claim, even if the alleged error is of constitutional dimensions.⁴ However, this is a procedural rule which does not affect the jurisdiction of an appellate court.⁵ A constitutional issue may be raised and

¹ A.R.S. Section 28-3158(C).

² Arizona Rules of Criminal Procedure.

³ RT of September 29, 2000 at 48.

⁴ State v. Lefevre, 193 Ariz. 385, 389, 972 P.2d 1021, 1025 (App. 1999).

⁵ Larsen v. Nissan Motor Corporation in USA, 194 Ariz. 142, 978 P.2d 119 (App. 1999).

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addressed for the first time on appeal where the issue is of state-wide importance or significance, is raised in the context of a fully developed record, the issues do not turn on resolution of disputed facts, and the issues have been fully briefed by all parties.⁶ Consideration of constitutional issues raised for the first time on appeal is discretionary.⁷ Arizona law presumes that statutes are constitutional, and any party asserting the unconstitutionality of a statute has a burden of clearly demonstrating its constitutional infirmities⁸, and, whenever possible, Arizona Courts construe statutes so as to avoid rendering them unconstitutional, and resolve any doubts in favor of a finding of constitutionality.⁹

In Hawkins v. Allstate Insurance Company¹⁰, the Arizona Supreme Court declined to exercise its discretionary power to consider constitutional issues raised for the first time on appeal. The Court stated:

Efficient and orderly administration requires some point in time at which it is too late to raise new issues on appeal. We note that Allstate did not raise its constitutional arguments in the pleadings, post trial motions, Court of Appeals, Petition (or Cross-Petition) for Review, Response to Petition for Review, or at oral argument. Allstate first voiced its constitutional concerns after the issues for review by this Court were set by our Order granting the Petition for Review. In light

⁶ *Id*; Jiminez v. Sears, Roebuck & Co., 183 Ariz. 399, 904 P.2d 861 (1995); Gosewisch v. American Motor Company, 153 Ariz. 400, 737 P.2d 376 (1987); Cutter Aviation Inc. v. Arizona Dept of Revenue, 191 Ariz. 485, 958 P.2d 1, (App. 1997).

⁷ Hawkins v. Allstate Insurance Company, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987).

⁸ Larsen v. Nissan Motor Corporation in USA, *Supra*.

⁹ *Id*.

¹⁰ *Supra*.

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of this procedural history, we believe it does not promote sound appellate practice to consider issues so belatedly urged.¹¹

Not only did appellant fail to timely raise the constitutional issue before the trial court, but appellant also failed to brief the issue as appellant's counsel had promised the trial judge. Perhaps more importantly, the record fails to demonstrate that appellant has standing as an illegal alien to assert the constitutional claim of denial of equal protection. As such the record before the trial court is not sufficient to preserve and present a constitutional issue of such importance to this court for appellate review. This court finds that appellant failed to challenge the constitutionality of the statute previously mentioned. This court declines to exercise its discretionary power to review the constitutionality of that statute based upon the insufficiency of the record before this court.

Appellant having no other complaints regarding his convictions, this court does find sufficient and substantial evidence was presented which would support the trial judge's findings.

IT IS THEREFORE ORDERED affirming the judgements of guilt and sentences imposed in this case.

IT IS FURTHER remanding this matter back to the Phoenix City Court for future proceedings.

¹¹ 152 Ariz. At 503, 733 P.2d at 1086.
Docket Code 513